A **LEMBAGA PEMBANGUNAN DAN LINDUNGAN TANAH (LAND CUSTODY AND DEVELOPMENT AUTHORITY)**

v.

CRYSTAL REALTY SDN BHD & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[SUIT NO: 22-44-2002-II]
26 OCTOBER 2009

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CIVIL PROCEDURE: *Costs - Taxation - Application for review - Decision of senior assistant registrar revising amount of getting-up fees from RM180,000 to RM80,000 - Whether senior assistant registrar committed any errors in coming to her decision - Principles applicable*

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This was an application for review of the taxation of costs given by the Senior Assistant Registrar ('SAR'), who had revised an earlier decision made by another Senior Assistant Registrar to award RM180,000 as getting-up fees for the trial of this action. The trial judge had dismissed the plaintiff's claim as well as the defendants' counterclaim with each party to bear their own costs. The defendants disputed their counsel's bill of costs claiming RM250,000 as getting-up fees. The first Senior Assistant Registrar awarded RM180,00 but the SAR, on review, reduced the amount to RM80,000. Both the plaintiff and the taxing solicitor, Ivan Ong, were displeased with her decision and applied for a review of the item on the getting-up. The plaintiff contended it should be reduced further to RM25,000 whereas Ivan Ong averred it should be maintained at RM180,000.

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G **Held (dismissing both summons in chambers with no order as to costs):**

(1) The SAR had referred to the pleadings and the trial judge's judgment. She had also made reference to the fact that Ivan Ong for the plaintiff had to take over the case just a week before the trial began and acknowledged that the short notice meant he had to expend greater effort to study the brief and prepare the case for trial. She had also considered the fact that Ivan Ong had issued a bill for RM60,000 to the defendants which they refused to pay in full, resulting in this taxation. Finally, this was a relatively simple case of breach of agreement

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and the trial was uncomplicated because counsel for both parties had agreed on so many documents, facts and issues for trial. The trial was rendered even easier by the use of witness statements, although counsel would still have to take their clients and witnesses through the documents. In the circumstances, there were no errors in the SAR's decision. The amount of getting-up she ordered, even if it seemed exorbitant to the defendants and inadequate to the plaintiff, was maintainable as she had not erred in her assessment of the same. *Bar Council v. Datuk V Kanagalingam* (foll). (paras 7-9)

Case(s) referred to:
Bar Council v. Datuk V Kanagalingam [2000] 3 CLJ 697 FC ***(foll)***
Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Sdn Bhd & Ors [1990] 1 CLJ 466; [1990] 1 CLJ (Rep) 699 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 59
Subordinate Courts Rules 1980, O. 48 r. 12

For the plaintiff - Ivan Ong; M/s Ivan Hussein Advocates
For the defendants - Zal Hii; M/s Suhaili & Bong Advocates

Reported by Suresh Nathan

JUDGMENT

Rhodzariah Bujang JC:

[1] This matter came before me under an application for review of taxation of the costs given by the learned senior assistant registrar on 21 July 2009 who had revised an earlier decision made by another learned senior assistant registrar to award RM180,000 as getting-up fees for the trial of this action.

[2] The trial was heard by YA Dr. Haji Hamid Sultan Abu Backer who dismissed the plaintiff's claim as well as the defendants' counterclaim with each party to bear their own costs. The defendants' have disputed their counsel's Bill of Cost in which their counsel had claimed RM250,000 as getting-up fees. As stated earlier, the first senior assistant registrar awarded RM180,000 as the getting-up fees whereas on review, the second senior assistant registrar reduced the amount to RM80,000.

[3] Both the plaintiff and the taxing solicitor, Mr. Ivan Ong were displeased with her decision and applied for a review of the item on the getting-up. The plaintiff said it should be reduced further to RM25,000 whereas Mr. Ivan Ong said it should be maintained at RM180,000.

Getting-up Fees

[4] Simply put, the getting-up fees are payment for the work done by the solicitor in pursuing or defending a claim in court. How much fees should be granted is at the court's discretion but the Federal Court in *Bar Council v. Datuk V Kanagalingam* [2000] 3 CLJ 697 have held that in exercising that discretion, regard be had to the factors stated in O. 59 Appendix I Part X para. 1(2) of the Rules of High Court 1980.

[5] Order 59 Appendix I Part X para. 1(2) provides as follows:

> In exercising his discretion under this paragraph or under rule 31(2) in relation to any item, the Registrar shall have regard to all relevant circumstances, and in particular to:
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> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client;
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> (f) where money or property is involved, its amount or value;
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> (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relations to the item in question.

Thus, the overriding considerations in determining cost are the complexity of the case both in terms of the law and the facts which may give rise to difficult and novel questions for determination by

the court and which in turn requires skill and specialized knowledge of counsels. It is the amount of effort – research and the burning of the midnight oil that the registrar is called upon to translate into ringgit and sen; not entirely an easy process, even for a registrar (or the senior assistant registrar, as in this case) who has been practicing law privately; let alone one who has never done so.

[6] The defendants' counsel, Mr. Zal Hii has submitted that in *Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Sdn Bhd & Ors* [1990] 1 CLJ 466; [1990] 1 CLJ (Rep) 699, the court has given the advice that the fixed scale of cost set out in O. 48 r. 12 of the Subordinate Courts Rules 1980 is a good guideline to follow but there is difficulty in employing that method here for the reason that both the plaintiff's claim and the defendants' counterclaim were dismissed by the court. A judgment sum would have been of some assistance to the amount of getting-up the registrar should give in relation to the fixed cost prescribed in the Subordinate Courts Rules 1980.

[7] Be that as it may, Mr. Zal Hii has been helpful in drawing my attention to the decision of the Federal Court in *Bar Council v. Datuk V Kanagalingam (supra)*. Although the decision was in respect of taxation of cost in an appeal in the Federal Court, at p. 702 of the report, Chong Siew Fai FCJ's sage advice on how I should approach the application in this case is one I have taken heed. The views expressed by His Lordship are to me invaluable and I have taken the liberty of reproducing it extensively in this judgment as a reminder to myself and the counsels herein of the correct approach to take in this hearing. His Lordship said:

> Following the principles laid down by the courts in England, *the law in Malaysia pertaining to review of taxation by a Judge is not to interfere with the costs awarded by the Registrar (ie, on quantum) unless it can be shown that the Registrar has erred on a question of principle or has taken into account irrelevant considerations in arriving at his decision.* (see for example, *Chin Chain Sen v. Foo Chee Sang & Anor* [1952] 18 MLJ 99, *United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181; and *Co-operative Central Bank Ltd v. Tan Nyap How* [1997] 4 MLJ 568.)
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> In *White v. Altrincham Urban District Council* [1963] 1 All ER 923, Slesser LJ said (pp 926 and 927):
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> In my opinion, the judge had no power to disturb the discretion of the registrar expressly given him by the rule on a mere question of quantum unless the registrar has purported to exercise that

discretion in a way not warranted by law. That such a view had long been held in proceedings in the High Court cannot be disputed. In *Alsop v. Lord Oxord* [1833] 1 My & K 564 at p. 566, Sir John Leech, MR, said:

> Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact whether the business had been done, and of the proper charge to be made for it; the court will only interfere where the master acts upon some mistaken principle.

Of cases since the Judicature Act, it is sufficient to cite Buckley LJ in *Ogilvie* [1910] P 243 at p 245, quoted with approval by Swinfen Eady LJ in *Slingsby v. AG* [1918] P 236 at page 239, to the effect that:

> *On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision.*

In the Singapore case of *Diversey (Far East) Pte Ltd v. Chai Chung Ching Chester & Ors (No 2)* [1993] 1 SLR 542 CA Rajendran J, delivering the judgment of the court said (Pg. 552):

> *The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error.* The *dicta* of Aitken J in *Kana Moona Syed Abu Bakar* [1940] MLJ 4 to the effect that a judge would be justified in interfering where the registrar's decision was 'an affront to reason and common sense' is, in our opinion, too harsh a standard to apply. What is required is a broad overview of the matter by the judge and if there is an error in principle or some other material error, he will be justified in interfering with the decision below. (emphasis added).

With the following principles in mind I have scrutinized the learned senior assistant registrar's ruling where she has made references to the pleadings and the judgment of YA Dr. Haji Hamid Sultan Abu Backer. I too checked the pleadings, the notes of proceedings and the judgment and even the submissions of the counsels as well as the number of witnesses and the days of trial of the action. She has made reference to the fact that Mr. Ivan Ong for the plaintiff had to take over the case just a week before the trial began and acknowledged that the short notice means he has to expend greater effort to study the brief and get ready the case for trial. She had

also considered the fact that Mr. Ivan Ong had issued a bill for RM60,000 to the defendants but which they refused to pay in full, resulting in this taxation.

[8] Finally, I must mention for clarity that although I agree with her that this was a relatively simple breach of agreement's case but I note also that the trial was rather uncomplicated simply because the counsels have agreed on so many documents, on the facts and the issues for trial. The trial is rendered even easier by the use of witness statements but these statements and the agreements mentioned earlier represent the work of counsels who still have to take their clients and witnesses through the documents.

[9] Now, I asked myself where has she gone wrong in her judgment? Without hesitation I must say that I cannot find the errors in her decision. The amount of getting-up she ordered, even if it may seem exorbitant to the defendants and inadequate to the plaintiff, is in my view maintainable for she has not erred in her assessment of the same. Accordingly, I dismiss both the summons in chambers and make no order as to costs since both parties have lost in their applications to have the decision of the learned senior assistant registrar reviewed.